LEGAL UPDATES

Presented by:

Perry M. Theriot, Louisiana Department of Environmental Quality

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September 2018

Louis Goodman et al V Shalimar Investments LLC
United States District Court for the S.D. of Indiana
No. 4:14-CV-00079-SEB-TAB (Westlaw); 7/21/2016

Arises out of a release from a UST alleged to damage a third party.

Defendant seeks a protective order barring Plaintiffs from inquiring in depositions of Defendants concerning their relationship with a consultant and payments from the Excess Liability Fund.

Plaintiff in discovery attempted to obtain defendant's environmental consultant's investigation and response actions and its costs; records of the submittal of the costs to IDEM (the state fund) and how much was reimbursed. Defendant pleads that the information is privileged.

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Rule 37-1 requires that counsel "confer in good faith" on discovery.

Rule requires more than exchange of letters, emails, or other electronic demands.

Rule contemplates an actual meeting with a date, time, and place whether by telephone,

Videoconference, or face to face. If unsuccessful, to engage the magistrate.

- Defendant's counsel exchanged only four emails (two each way apparently), the first threatening a protective order.
- Neither of the defendant's emails contained a suggested time, date, or place or plan to resolve the matter.
- The defendant failed to contact the Magistrate Judge before filing for the protective order.

Defendant pleads "attorney-client privilege" and "work product privilege."

Louis Goodman et al V Shalimar Investments LLC
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Finding:

- Defendant must produce the information requested;
- Inquiry did not involve legal communications, but instead procedural and monetary facts;
- Work product involves the mental processes of the attorney or his agents;
- A consultant hired for remediation purposes was not initially hired as an expert- but to conduct remediation activities.

Parker v. John Moriarty & Associates

United States District Court, District of Columbia.
224 F.Supp.3d 1
December 14, 2016

- Construction worker brought **negligence** action against general contractor, seeking to recover damages for personal injuries he allegedly sustained when he was exposed to toxic chemicals from leaking **underground storage tanks** during construction project.
- General contractor filed third party complaint for contractual indemnification against subcontractor it hired to perform excavation and backfill work.
- Subcontractor filed nunc pro tunc motion for leave to file fourth-party complaint asserting tort and contract claims against provider of professional environmental services to the project, and provider moved to dismiss fourth-party complaint.
- Fourth Party Defendant ECC contracted with the Owner of the project to provide professional environmental services to the project.
- Defendant/Third Party Plaintiff JMAV was the general contractor on the project.
- Third Party Defendant/Fourth Party Plaintiff Strittmatter was hired by JMAV as a subcontractor to perform excavation and backfill work on the project.
- Plaintiff Johnnie Parker worked on the project as an employee of Strittmatter and alleges that on December 18, 2014, he was instructed to excavate perform excavation as part of his regular duties of employment.
- Mr. Parker further alleges that he was injured while performing this work because he was exposed to toxic chemicals from leaking **underground storage tanks.**

Parker v. John Moriarty & Associates
United States District Court, District of Columbia.
224 F.Supp.3d 1
December 14, 2016

- The contract between ECC and the Owner provided that the ECC would perform a Voluntary Removal Action Plan (VRAP) in order to receive a "Case Closure" or "No Further Action" determination pursuant to D.C. Municipal Regulation.
- The VRAP also indicated that the purpose of the voluntary correction actions was, in part, to "ensure the health and safety of future residents, construction workers, and area residents during construction...."
- The remediation actions proposed in the VRAP also included the preparation and implementation of a site-specific Environmental Health and Impacted Material Safety Plan (EHASP) for excavation and dewatering activities, including on-site air monitoring for construction workers and perimeter air monitoring.
- Pursuant to the VRAP, all site excavation activities were to be conducted in accordance with the EHASP.
- The EHASP was prepared by ECC and reviewed and approved by companies performing work on the site, including Strittmatter as a subcontractor completing excavation work.

Parker v. John Moriarty & Associates
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224 F.Supp.3d 1
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- Strittmatter raises four claims against ECC.
- First, Strittmatter raises a negligence claim against ECC. Specifically, Strittmatter contends that ECC had a duty to Strittmatter and others and, if Plaintiff Parker prevails on his claims, ECC breached the following duties: (1) to ensure the safety of workers on the project from volatile organic compound ("VOC") vapors; (2) to continuously monitor VOC vapors during excavation and warn of hazards; (3) to perform its services pursuant to the standard set for an environmental professional and/or a certified professional geologist; and (4) to institute safety precautions and regulate safety equipment in accordance with the contract, the EFIASP, and the VRAP.
- Second, Strittmatter argues that if it is found liable, it is entitled to indemnity and/or contribution from ECC because of ECC's **negligence.**
- Third, Strittmatter asserts a breach of contract claim, asserting that it is a third party beneficiary of the contract between ECC and the Owner and that ECC breached the terms of that agreement.
- Finally, Strittmatter raises a negligent misrepresentation claim against ECC, contending that "ECC directly and indirectly made knowingly and/or recklessly false and misleading statements about the environmental conditions at the H Street Project and failed to perform its duties in monitoring the Environmental Conditions pursuant to the ECC/Owner contract and the relevant statutes regarding **undergrounds storage tanks."**

Parker v. John Moriarty & Associates
United States District Court, District of Columbia.
224 F.Supp.3d 1
December 14, 2016

- The District of Columbia Court of Appeals ("D.C. Court of Appeals") has adopted the approach in the Restatement (Second) of Torts for determining whether a party who performs services pursuant to a contract to one party assumes a common law duty to an unrelated third party. Specifically, the court explained:
- One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things,
  is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
  (a) his failure to exercise reasonable care increases the risk of such harm, or
  (b) he has undertaken to perform a duty owed by the other to the third person, or
  (c) the harm is suffered because of reliance of the other or the third person upon the undertaking

Parker v. John Moriarty & Associates
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224 F.Supp.3d 1
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- In reviewing the contract, the VRAP, and the EHSAP in the light most favorable to Strittmatter, it appears that the provisions at least contemplate ECC's role is not only in crafting the safety recommendations for the job site but also in monitoring the site safety conditions on a daily basis and taking certain steps, including potentially stopping work, in the event that hazardous conditions were detected.
- These were provisions of the EHASP that Strittmatter was required to review and approve.
- While the Court in its foreseeability analysis must look to the terms of the contract, the Court also must look to the actual nature of ECC's undertaking based on the specific facts of this case.
- Here, the Court cannot conclude that Strittmatter's tort claims fail as a matter of law based strictly on the language of the contract.

In the Matter of Zahav Enterprises, Inc. et al V Martens Supreme Court, Appellate Division, Second Department, New York 2015-01993, 28984/11; May 3, 2017

Appeal from an Order of the Commissioner imposing a Civil Penalty

Petitioner/Plaintiff and its predecessor in interest owned property containing 3 active UST's from 1985-2007.

Sold the property to Unicorp to develop as a Walgreens in 2007. Seller expressly agreed to undertake remediation as part of the sale.

During remediation efforts 30 abandoned UST's were discovered.

Reported the contamination to the agency who prevented development of the property until a remediation plan was approved.

The submitted work plan was not approved, and most subsequent reports were also rejected.

The Petitioner was sent an official notice on Nov. 5, 2010 that if it did not receive a plan that addressed the soil and groundwater by Nov. 24, 2010, it would be referred to the Office of the General Counsel.

In the Matter of Zahav Enterprises, Inc. et al V Martens Supreme Court, Appellate Division, Second Department, New York 2015-01993, 28984/11; May 3, 2017

On March 30, 2011, the DEC moved for an Order (Penalty) of $112, 500 for failing to carry out the requirements in the stipulation (Order).

An administrative determination was made that imposed a $65,000.00 Penalty. An appeal was taken.

Defenses

- Issues of facts were improperly resolved;
- Penalty imposed was excessive and shocked the “sense of fairness”;
- The order failed to take into account the cost of the remedial actions already taken;
- The procedure used failed to meet due process.

In the Matter of Zahav Enterprises, Inc. et al V Martens Supreme Court, Appellate Division, Second Department, New York 2015-01993, 28984/11; May 3, 2017

Order is Upheld

- The proof presented was sufficient;
- The ALJ's finding reducing the penalty without a hearing was not arbitrary or capricious;
- The affidavit of the attorney for DEC and the Affidavit of the DEC staff member were sufficient to place the petitioner on notice.

Atlantic Casualty Insurance Company v. Garcia
United States Court of Appeals, Seventh Circuit.
December 22, 2017
878 F.3d 566

- Defendants-appellants, Juan and Maria Garcia ("the Garcias"), filed a claim with plaintiff-appellee, Atlantic Casualty **Insurance** Company ("Atlantic"), for **insurance** coverage.
- Atlantic responded by seeking declaratory judgment. The Garcias replied with counterclaims for breach of the policies and bad faith for denial of their claim.
- The district court granted summary judgment in favor of Atlantic and the Garcias appealed.
- The Garcias purchased commercial property at 2316 Ripley Street, Lake Station, Indiana ("the Property"), on August 9, 2004.
- During the Garcias' ownership, the Property was used to operate an automobile repair shop and a day spa.
- Prior to their ownership, the Property was used as a dry cleaning facility from approximately 1946 until 2000.
- The site contained six **underground storage tanks** used by the dry cleaning company.
- Four of these tanks were used for petroleum-based Stoddard solvent, one was used for gasoline, and the last for heating oil.
- In 1999, the dry cleaning company reported a newly discovered leak from the Stoddard solvent tanks to the Indiana Department of Environmental Management ("IDEM").

Atlantic Casualty Insurance Company v. Garcia
United States Court of Appeals, Seventh Circuit.
December 22, 2017
878 F.3d 566

- In 2000, a site investigation was conducted, an Initial Site Characterization Report was prepared, and five groundwater monitoring wells were installed.
- On February 9, 2001, IDEM requested additional investigation to fully delineate the nature and extent of the petroleum pollution, as well as testing for volatile organic compounds.
- Due to a lack of information provided from the February 2001 request, IDEM requested additional testing on April 8, 2004.
- The Garcias claim they had no knowledge of the preexisting environmental contamination before insuring with Atlantic.
- In September 2014, a letter from Environmental Inc., dated July 10, 2014, brought the contamination to the Garcias' attention.
- In the spring of 2015, the Garcias hired Environmental Inc. to investigate the Property.
- This investigation showed that the chemicals from the Stoddard solvent tanks, Perchloroethylene solvent, and heating oil still affected the Property.
- Atlantic insured the Property with two policies that ran consecutively, starting on June 25, 2009, and ending on June 25, 2011.
- Both were substantially similar Commercial General Liability Coverage ("CGL") policies.
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Atlantic Casualty Insurance Company v. Garcia
United States Court of Appeals, Seventh Circuit.
December 22, 2017
878 F.3d 566

- Both contained relevant exclusion provisions that modified the CGL policies through a "Claims in Process" exclusion and a "Total Pollution Exclusion".
- The relevant language from the "Claims in Process" exclusion states:

  1. any loss or claim for damages arising out of or related to "bodily injury" or "property damage", whether known or unknown:
     a. which first occurred prior to the inception date of this policy; or
     b. which is, or is alleged to be, in the process of occurring as of the inception date of this policy.
  2. any loss or claim for damages arising out of or related to "bodily injury" or "property damage", whether known or unknown, which is in the process of settlement, adjustment or "suit" as of the inception date of this policy
- Policy terms are interpreted from the perspective of an ordinary policyholder of average intelligence, and if reasonably intelligent persons may honestly differ as to the meaning of the policy language, the policy is ambiguous.
- Ambiguities are construed strictly against the insurer to further the general purpose of the **insurance** contract to provide coverage.

Atlantic Casualty Insurance Company v. Garcia
United States Court of Appeals, Seventh Circuit.
December 22, 2017
878 F.3d 566

- The Garcias argue that the "Claims in Process" exclusion is ambiguous.
- In so arguing, the Garcias state that the three parallel conditions following the phrase, "whether known or unknown," could modify "any loss or claim for damages," rather than " 'bodily injury' or 'property damage,' " as the district court found.
- Accepting the Garcias' interpretation would exclude coverage for a *claim* for damages that occurred or was in the process of occurring before inception of the policy.
- On the other hand, accepting the district court's interpretation would exclude coverage for any *injury or damage* that occurred or was in the process of occurring before inception of the policy.
  While exclusions limiting coverage are allowed, such limitations must be clearly expressed to be enforceable.
- Thus, if the property damage happened before the policy period, but the damage had not been discovered, the exclusion bars coverage.
- With no dispute that the damage to the Property began before the inception of the policies, we find that the "Claims in Process" exclusion bars recovery on behalf of the Garcias.

Muncie V Wiesemann
2017-SC-000235
June 14, 2018

Appeal of a Ruling that Stigma Damages were not available; Supreme Court Reverses

- Release of 1000 gallons of fuel oil, December 12, 2010;
- Oil travelled downhill and flooded a neighboring residence;
- Oil continued to travel downhill to neighboring residence even after response actions were taken;
- Emergency declared Jan. 13, 2011 by agency;
- Insurance company filed interpleader action in Federal Court;
- All parties enter into a Partial Settlement and Partial release;
- Neighboring landowners reserved the right to proceed for “diminution of value”;
- Neighboring landowners filed claim in state court and are met with a Motion for Summary Judgement based upon the settlement.

Muncie V Wiesemann
2017-SC-000235
June 14, 2018

Lower Court ruled that a claim for diminution of value could not be brought without a claim for remediation. Appeal was filed.

- Stigma damages are available when actual damages are present;
- Defense is that when property damages are present, a party must choose either the cost of repair of the loss of value.

Ruling: Damages are recoverable for an actual injury to the property *and* the difference in the fair market value of the property before the injury and after it has been repaired;

Matter was remanded for presentation of evidence of stigma damages.

Hartley Company v. JF Acquisition, LLC d/b/a Jones & Frank, Defendant
United States District Court, S.D. Ohio, Western Division.
May 1, 2017
2017 WL 1628529

- As of January 20, 2017, Hartley had submitted reimbursement claims in the amount of $247,626.07, and it was anticipated that an additional applications would be filed with the Ohio Petroleum Underground Storage Tank Financial Assurance Fund ("The Fund").
- The Board, as of that date, had issued reimbursements to Hartley in the amount of $76,687.58.
- The Board "is entitled by subrogation to all rights of the responsible person to recover those costs from any other person.
- Any settlement, compromise, judgment, award, or other recovery in favor of the responsible person shall not preclude The Board from enforcing its subrogation rights against the other party(s).
- Hartley claims that The Board's indemnification and subrogation rights are immaterial to the pertinent matter before the Court as to whether JF breached its contract and negligently failed to properly tighten the SwiftCheck Valve, causing an extensive release of gasoline and resulting damages.
- Hartley claims, a jury can make those liability and damages determinations without implicating The Board.
- Hartley argues that The Board's subrogation and indemnification rights are not triggered until a finding on liability is made, and notes that it must remit any recovery it obtains to The Board.

Hartley Company v. JF Acquisition, LLC d/b/a Jones & Frank, Defendant
United States District Court, S.D. Ohio, Western Division.
May 1, 2017
2017 WL 1628529

- Hartley argues, The Board is not a necessary party, as The Board does not need to be joined to protect its interest.
- Further, Hartley claims, JF is at no risk of incurring multiple, inconsistent obligations, as The Board would have no reason to pursue recovery against JF, given Hartley's obligation to remit any recovery it receives from JF to The Board.
- The Board has conceded that a judgment against JF, and JF's satisfaction of same, would not operate to extinguish The Board's subrogation right and The Board has not agreed to release its right of subrogation even if JF were to satisfy any judgment that might be rendered against it.
- While The Board has indicated it could release its subrogation and indemnification rights if an acceptable settlement is reached, The Board has not done so to date, as remediation efforts on Hartley's property are ongoing, and the amount of actual damages is uncertain.
- As such, JF argues that if The Board is not joined, JF will be at substantial risk of incurring multiple, inconsistent obligations to Hartley and The Board.
- In evaluating the parties' briefing, and its own research on the subject, the Court concludes that The Board's exclusion from this litigation would create an acute risk that JF will incur obligations to both Hartley and The Board for the same liability.

Hartley Company v. JF Acquisition, LLC d/b/a Jones & Frank, Defendant
United States District Court, S.D. Ohio, Western Division.
May 1, 2017
2017 WL 1628529

- For example, because the amount of damages is uncertain, The Board may ultimately issue a greater amount in reimbursements to Hartley than the amount of a judgment assessed against JF, even if a jury found JF to be one hundred percent liable for the damages to Hartley's property.
- In such a scenario, The Board would still be able to exercise its right of subrogation against JF, even if JF had discharged its liability to Hartley by paying the full judgment amount.
- Also, despite Hartley's legal obligation to remit to The Board any funds that it receives in a judgment, if Hartley fails to do so, The Board is not obligated to exercise its right of indemnification against Hartley prior to exercising its right of subrogation against JF.
- Neither Hartley nor The Board claims, much less cites to statutory authority, that JF paying the full judgment to Hartley somehow estops The Board from exercising its subrogation rights, in the event that Hartley does not remit the judgment proceeds to The Board.
- Thus, absent The Board's joinder, JF may be liable to both Hartley and The Board, in an amount greater than its total liability as determined by the trier of fact.
- This acute risk of multiple, inconsistent obligations leads the Court to conclude that The Board is a necessary party.

People of the State of Illinois V Nagle Station, LLC
No. 1-16-0534
September 27, 2017

Petitioners sought to intervene in an enforcement action brought against the owner of a gas station located next to their properties.

- Circuit Court denied their Petition based upon a lack of standing;
- Court of Appeal Reverses based upon Code of Civil Procedure;

Facts:

- State files complaint for injunctive relief against both the owners and the operator of the UST's;
- Plaintiffs own an apartment complex located next door;
- Release on July 9, 2014, is reported to the agency;
- On October 10, 2014, the gasoline shows up at 23% of LEL in the apartment complex which is evacuated;
- State files a complaint alleging the leak and the continued migration of contaminates;
- State requests injunction ordering the owner/operators to assess the contamination and the vapors associated with the release and provide a plan for remediation;
- On October 31, 2014, the court awarded the injunction;
- On January 27, 2014, the petitioners filed to intervene and asked to amend the Order;
- Petitioners ask the court to provide them input in the form of their own experts;
- Owner/Operators oppose the intervention based upon the Order.

People of the State of Illinois V Nagle Station, LLC
No. 1-16-0534
September 27, 2017

Issue:

- Does the state's statute stating that only the Attorney General can institute an action for injunctive relief preclude the intervention under the Code of Civil Procedure;
- Is the fact that the order does not apply to the petitioners preclude the intervention;
- Does the fact that there is a right to file an independent complaint preclude the intervention.

Findings:

- Intervener are "bound" by an order or judgment when they stand to gain or lose by the direct legal operation and effect of the judgment;
- There is no requirement in the statute that the petitioners be bound by the preclusive effect of the Order.
- Interest required for an intervention is not whether they could maintain an independent suit, but where the intervener/aspirant has not claim against the defendant yet a legally protected interest that could be impaired by the suit.
- Incorrectly applying the law is by its nature an abuse of discretion.

Two Farms Inc. v. Greenwich Ins. Co.

United States Court of Appeals, Second Circuit.
October 16, 2015
628 Fed.Appx. 802

- Insured commenced action against pollution and remediation insurer, alleging breach of policy based on insurer's failure to pay excess covered expenses.
- Greenwich issued a pollution and remediation liability policy to Two Farms on April 16, 2008.
- The policy remained in effect until April 16, 2010.
- The policy contains a set of exclusions, denying coverage for liability resulting from certain causes, including loss "based upon or arising out of the existence of any **underground storage tank(s)** and associated piping."
- However, certain specified **"underground storage tank(s)** and associated piping" are not subject to this exclusion.
- Endorsement 10 in the policy lists the **tanks** that benefit from this exception.
- The policy in Endorsement 7 applies a sublimit to the **tanks** within this exception, capping the coverage amount for each loss or remediation expense associated with an excepted **underground storage tank** and its associated piping at $1,000,000. (The policy caps the total annual coverage for such losses and expenses at $5,000,000).
- In December 2009, Two Farms discovered that an **underground storage tank** at a Two Farms gas station in Baltimore, Maryland had discharged several thousand gallons of gasoline.
-

Two Farms Inc. v. Greenwich Ins. Co.

United States Court of Appeals, Second Circuit.
October 16, 2015 628
Fed.Appx. 802

- Two Farms alleges that three devices located on the exterior of the **tank** in question—the "O-ring," the containment sump, and the sensor—caused this loss.
- The parties do not dispute that the **"underground tank[ ]** and associated piping" responsible for the discharge is listed in Endorsement 10, and was therefore not subject to the policy's exclusion.
- In fact, after Two Farms filed a claim with Greenwich, the insurance company paid Two Farms $1,000,000 toward loss and remediation expenses, plus $250,000 in legal expenses.
- Two Farms, interpreting the sublimit of $1,000,000 to be inapplicable to its loss, filed its complaint in January 2012.
- Two Farms contends that the meaning of the phrase, **"underground storage tank(s)** and associated piping," varies across the policy.
- In particular, Two Farms seeks a narrow construction of **"underground storage tank(s)** and associated piping" in Endorsement 7's sublimit, so that the sublimit would not apply to the losses and expenses Two Farms experienced arising from the malfunction of the O-ring, containment sump, and sensor.
- At the same time, Two Farms agrees with Greenwich that as to the exception, a broader construction of the phrase should apply, so that these very same losses and expenses are covered by the policy.

Two Farms Inc. v. Greenwich Ins. Co.

United States Court of Appeals, Second Circuit.
October 16, 2015 628
Fed.Appx. 802

- Simply put, Two Farms cannot have it both ways.
- Generally, "a word used by the parties in one sense will be given the same meaning throughout the contract in the absence of countervailing reasons."
- Two Farms points to no "countervailing reason[ ]" for according varying meanings to the same phrase in this insurance policy.
- To the contrary, the policy unambiguously uses the same terms in order to precisely and consistently define the scope of coverage, both in the exclusionary language and in the sublimit.
- Two Farms claimed that any ambiguity should be construed against the insurer.
- But there is no ambiguity here.

Mid-Continent Casualty V Petroleum Solutions, Inc.
United States District Court for the Southern District of Texas, Houston Division
Civil Action No. 4:09-0422; 09/29/2016

Suit against the insurance company by the insured involving coverage under a CGL policy issued by Mid-Continent;

Cross Motions for Summary Judgment; One by Mid-Continent, the other by PSI;

Both Motions Granted in Part and Denied in Part;

Does a CGL policy provide coverage for a judgement against a manufacturer for loss incurred in meeting its obligations as a manufacturer owing indemnification to an innocent seller of losses incurred by the seller in a products liability action (an indemnity provision many states have)?

Mid-Continent Casualty V Petroleum Solutions, Inc.
United States District Court for the Southern District of Texas, Houston Division
Civil Action No. 4:09-0422; 09/29/2016

Facts

- Mid-Continent issued a CGL policy covering the business of PSI;
- PSI installed a UST system at the Silver Spur Truck Stop;
- PSI purchased a component part for the system from TiteFlex;
- Release of over 20,000 gallons in October 2001;
- PSI and Mid-Continent believed the release was the result of a failure of the flex connector;
- The flex connector was tested and stored in W.H. Labs storage facility;
- The flex connector was lost.

Mid-Continent Casualty V Petroleum Solutions, Inc.
United States District Court for the Southern District of Texas, Houston Division
Civil Action No. 4:09-0422; 09/29/2016

Procedural Standing

- Suit filed in state court by UST owner against PSI; allegations of breach of warranty of good and workman like service and negligence for the installation of the system;
- Mid-Continent assumes defense of PSI but reserves rights;
- PSI files a third-party suit against TiteFlex, the manufacturer of the flex connector for contribution;
- Owner of UST amends petition to name TiteFlex;
- During pendency of action in state court; TiteFlex moved for a "spoliation" instruction due to PSI's failure to produce the flex connector;
- TiteFlex and PSI attempted to settle their claims against each other;
- All parties were using procedural moves in an attempt to get out of the claim;
- The matter went to trial between the UST owner and Teleflex's claims against PSI;
- The judge instructed the jury on spoliation;

Mid-Continent Casualty V Petroleum Solutions, Inc.
United States District Court for the Southern District of Texas, Houston Division
Civil Action No. 4:09-0422; 09/29/2016

Trial Court Finding:

- Jury Verdict-UST owner awarded $1,131,321.26 in damages and pre-judgment interest and $91,500.00 in attorney fees against PSI;
- TiteFlex was awarded $382,334.00 in attorney fees, $68,519.12 in expenses and $12,393.35 in costs as well as post-judgment interest against PSI;
- Texas Appellate Court upheld the judgment, the Texas Supreme Court reversed, finding that the spoliation instruction was incorrect;
- Texas Supreme Court reversed the judgment in favor of the UST owner and remanded for a new trial of the owners claims against PSI;
- Texas Supreme Court upheld the judgment on the claim by TiteFlex against PSI, expressly finding that the spoliation instruction did not effect that claim;
- On remand, the trial court granted summary judgment on the Owner's claim against PSI, finding no liability.

Mid-Continent Casualty V Petroleum Solutions, Inc.
United States District Court for the Southern District of Texas, Houston Division
Civil Action No. 4:09-0422; 09/29/2016

Insurance Issue

- Throughout the litigation, Mid-Continent has sent letters to PSI indicating that they may not provide coverage as "these items may not constitute damages because of "property damage" or "bodily injury" caused by an "occurrence" as defined in the policy;
- After the Texas Supreme Court affirmed the judgment awarded to TiteFlex, Mid-Continent denied coverage;
- Mid-Continent cast PSI's failure to accept the offer to settle constituted a "failure to cooperate" and that the policy exclusion that excludes losses caused intentionally by or at the direction of the insured are not covered;
- Mid-Continent files for a declaratory judgment in federal court asking to uphold its decision;
- Mid-Continent bases its request on three grounds:

1. The language of the policy does not support coverage;
2. Exclusion (q) applies (the failure to cooperate exclusion);
3. PSI's breed of its duty to cooperate when it rejected the compromise;

Mid-Continent Casualty V Petroleum Solutions, Inc.
United States District Court for the Southern District of Texas, Houston Division
Civil Action No. 4:09-0422; 09/29/2016

Ruling

- Texas law governs; Contract law to apply;
- The "cooperation clause" applies to PSI's conduct in declining the settlement offer;
- General issues of material fact exist regarding whether PSI breached the duty;
- Policy does not require indemnity to PSI for a portion of the TiteFlex Judgment;
- Attorney fees are damages as contemplated by the contract between PSI and Mid-Continent.

Mid-Continent Casualty V Petroleum Solutions, Inc.
United States District Court for the Southern District of Texas, Houston Division
Civil Action No. 4:09-0422; 09/29/2016

There is a long discussion of the items that should be covered by the policy, suffice to say it is a good discussion of insurance law and what claims are covered. It discusses, amongst other things:

- Definition of occurrence;
- Definition of Property Damage;
- Coverage Territory;
- Policy Period;
- Professional Liability Endorsement;
- Professional Services;
- "Damages because of" language;
- Difference between a "named peril" policy and a "all-risk" policy;
- Definition of "money damages" in the professional services endorsement.

There is an extensive appendix to the decision detailing facts available to the court.

Trujillo v. Ametek, Inc.

United States District Court, S.D. California.
July 17, 2017
2017 WL 3026107

- Plaintiffs allege that the toxic waste caused an **underground** plume of discharge that infected, and continues to infect, the groundwater below the Magnolia Elementary School ("Magnolia"), which shares a property line with the Defendant property.
- Plaintiffs further allege that the plume created toxic fumes that migrated, and continue to migrate, from the ground into the air at Magnolia.
- Plaintiffs filed a class action complaint against Defendants.
- Defendants separately moved for entry of a *Lone Pine* case management order.
- In these motions, Defendants asked the Court to issue a *Lone Pine* order requiring Plaintiffs to come forward with "prima facie evidence of exposure and causation before proceeding to expensive and time-consuming discovery and trial."
- The Court further ordered that each Plaintiff "produce a case-specific report within ninety (90) days of the issuance of the CMO including the following information:
- (1) the identity of any hazardous substance(s) originating from the Ametek Property to which the Plaintiff was exposed;
- (2) the level of exposure to substance(s) from the Ametek Property claimed by Plaintiff, and whether such level of exposure presents a human health risk;
- (3) the route of exposure;

Trujillo v. Ametek, Inc.
United States District Court, S.D. California.
July 17, 2017
2017 WL 3026107

- (4) the relative increase in the chance of onset of a specific disease(s) in the Plaintiff as a result of the exposure, when compared to (a) the Plaintiff's chances of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease;
- (5) the clinical value of early detection and diagnosis with respect to each particular disease(s) that the Plaintiff seeks to screen through medical monitoring;
- (6) the scientific and medical bases for the expert's opinions and conclusions, including specific reference to the particular scientific and medical literature forming the basis of the expert's opinion.
- The Court concluded by noting that "Any Plaintiff who fails to provide the case-specific expert report that complies with this Order ... will be subject to having his or her claims dismissed with prejudice upon application to the Court by Defendants."
- Attached to their *Lone Pine* submission are the declarations of five experts who collectively opine on Plaintiffs' *prima facie* showing regarding exposure, increased risk of specific injury, and causation, along with the specific requests made in the Court's CMO.
- Defendants argue that Plaintiffs have failed to make a *prima facie* evidentiary showing as required by the Court's *Lone Pine* order.

Trujillo v. Ametek, Inc.
United States District Court, S.D. California.
July 17, 2017
2017 WL 3026107

- In response to the Court's *Lone Pine* order, Plaintiffs offered expert case reports that opine that Plaintiffs were exposed to a significant level of chemical toxins that has increased their risk of developing certain health problems.
- Plaintiffs provided opinions from experts comprised of a hydrologist, a professional geologist, a board-certified toxicologist, a board-certified internist and nephrologist with a specialization in toxicology, and a pediatrician and medical toxicologist.
- Accordingly and for this reason, it is not necessary to pass upon the reliability and admissibility of the experts produced in order to conclude that Plaintiffs' evidentiary showing states a *prima facie* case.

State of Oklahoma Department of Transportation V Cedars Group et. al.
Supreme Court of Oklahoma
No. 113, 135; Filed 02/22/2017

Case arises out of a condemnation proceeding filed by the Oklahoma DOT

Question presented is whether attorney fees, expert fees, and engineering fees are recoverable in a condemnation proceeding.

- Oklahoma moved to condemn a right of way for highway improvements;
- Defendants contest the amount of compensation (purchase price);
- UST's had to be relocated and were initially moved, but were still in the easement;
- State contested the right of the landowners to recover the UST relocation expenses, attorney fees associated with the UST claim, and the engineering services contracted for.

Court Ruling:

- The attorney fees and engineering fees did "arise out of the condemnation" and were recoverable.

State of West Virginia DOT V Burnside
Supreme Court of Appeals for West Virginia
No. 15-1112; Submitted April 5, 2016; Filed June 13, 2016

Another Condemnation Proceeding brought by the DOT of West Virginia; At issue is valuation of property contaminated by a release from a UST. In the condemnation proceeding, is the value correct at the lower estimate of the property worth or should the value be the cost of the property with a deduction taken for expected remediation costs when there are suits filed against predecessors in title?

Facts:

- Property being condemned was an old gas station that from 1986-1988 was owned by Exxon;
- Property was acquired by H.C. Lewis Oil in 1991. An assessment of the property revealed contamination. H.C. Lewis removed fiberglass tanks installed by Exxon in 1988;
- Property was sold to Chrite Properties in 2007. Chrite borrowed money from the bank to build a Sonic Drive Inn;
- Chrite declared bankruptcy and the bank reclaimed the property in 2013;
- Appraisal of the property was $280,200.00, considerably lower than the $875,600.00 estimate by the appraiser, which noted that the higher estimate included the remediation costs;
- Bank appraises the property at $1,294,100.00 using the lawsuit it had filed against Exxon and H.C. Lewis as an attachment;
- Lower court requires the full amount of the state's estimate including the remediation cost be deposited.

State of West Virginia DOT V Burnside
Supreme Court of Appeals for West Virginia
No. 15-1112; Submitted April 5, 2016; Filed June 13, 2016

Ruling:

The appellate court finds that the state was correct in valuing the property taking into account the amount that would be necessary to remediate the release. There are two concurring opinions that discuss valuation at the time of condemnation for property with contamination. **There is a dissent that raises the fact that the environmental agency did not require a cleanup, but only continued monitoring of the existing contamination. It also raises questions. The property was nearing the end of the 20 year monitoring and the bank would not have been responsible for any remediation.**

R.M. Packer Co. Inc. V Marmik LLC & Others
Appeals Court of Massachusetts, Dukes County
No. 14-P-1638; Argued Sept. 2, 2015, Decided Nov. 25, 2015

Packer sued the defendants for contribution under the Oil and Hazardous Materials Release Prevention Act for contribution for cleanup costs associated with a release from UST's. Plaintiff is the seller/deliverer of wholesale diesel and gasoline to the UST's owned by Marmik but dispensing fuel from the USTs under a set compensation schedule with Dockside the suppliers of fuel to a marina in Martha's Vineyard.

Facts:

- The UST's were owned originally by Packer who sold them to Marmik. They were located at a gas station that was also sending fuel to the docks owned by Dockside;
- When the UST's were sold to Marmik, the supply arrangement was maintained;
- Due to driver error, the tanker truck pumped diesel into a tank without checking with a stick or consulting the Veeder Root System (VRS);
- The driver (who worked for Packer) pumped 1060 gallons of diesel into a tank that only had room for 273, rupturing the tank and shot the sensor rod within the tank through the top of the tank "like a rocket" and causing a small "gusher" to come out of the tank;
- Spill is estimated at to be 787 gallons of diesel;
- The employer of the truck driver, Packer, sued for contribution from Dockside and Marmik.

R.M. Packer Co. Inc. V Marmik LLC & Others
Appeals Court of Massachusetts, Dukes County
No. 14-P-1638; Argued Sept. 2, 2015, Decided Nov. 25, 2015

Finding:

- Lower court denied the claim, and instead ruled that Dockside should be paid its attorney fees and costs amounting to $66,409.50;
- Packer appealed;
- Lower court upheld the judgment.

BSK Enterprises, Inc. V Beroth Oil Company
Court of Appeals of North Carolina
No. COA15-189; March 1, 2016

Plaintiffs filed a complaint alleging defendant was strictly liable for contaminated groundwater under plaintiff's property and sought damages to cover the cost of remediation or relocation of its business from the contaminated property. Defendants admitted that a petroleum release from their property was discovered on June 3, 2005, but denied the rest of the claims. Jury trial was held on May 27, 2014. The jury found for the plaintiffs and awarded damages.

Facts:

- Beroth Oil Company (Beroth) was formed in 1958 and was a jobber selling fuel;
- In 1987, Beroth bought a gas station. In 1988, Beroth installed five UST's;
- In March 2005, Beroth decided to sell the property and conducted a phase II and discovered contamination. It reported it to the North Carolina Department of Environment (DENR);
- Beroth was ordered to do a comprehensive site assessment (CSA);
- In 2006, plaintiffs purchases an adjacent property for $130,000.00;
- Assessment reveals the contamination under the plaintiff's property and plaintiffs receive a letter requesting permission to access the property to place wells;
- No permission was granted until May of 2011;
- In October of 2011, the results of the assessment were reported to DENR which showed the contamination in the groundwater under plaintiff's property. It was ordered to present a Corrective Action Plan (CAP) to address the contamination;
- The CAP proposed active cleanup of defendant's property, with monitored attenuation of plaintiff's property. It was approved by DENR;
- Plaintiff hired and expert who called for more expensive remediation of it's property including chemical oxidation and groundwater barrier systems.

BSK Enterprises, Inc. V Beroth Oil Company
Court of Appeals of North Carolina
No. COA15-189; March 1, 2016

Procedural Standing:

- Jury trial with the verdict finding fair market value of $180,000.00 in uncontaminated state and $71,500.00 in contaminated state. The resulting "diminution in value" was set at the difference, $108,500.00;
- The jury decided that the cost to remediate the property was $1,492,000.00;
- The trial judge issued a "post-verdict order" which capped the remediation damages at $108,500.00, the amount of diminution in value caused by the contamination;
- Plaintiffs filed a notice of appeal and defendant cross-appealed.

Issue:

- Sole issue for plaintiffs is whether the trial court was correct in ruling that the damages were properly limited to the $108,500.00, the amount the property was devalued;
- Defendants maintain plaintiffs should have been dismissed for lack of standing; omitting its duty to mitigate jury instruction, awarding damages for diminution in value related to stigma, and denying the motion for judgment notwithstanding the verdict for nuisance and trespass absent evidence of real and substantial interference with the use of the property.

BSK Enterprises, Inc. V Beroth Oil Company
Court of Appeals of North Carolina
No. COA15-189; March 1, 2016

Finding:

- Proper measurement of damages is a question of law. That measurement is the difference in market value before and after the injury; or the cost of restoring the land to its pre-injury state;
- Court would not grant windfalls to plaintiffs when the cost of remediation greatly exceeds the value of the property;
- Plaintiffs maintain the approved CAP gave them no input and they are held hostage for the time of the CAP. Court disagrees;
- Court upholds the judge's determination setting damages at the difference between the cost uncontaminated and the contaminated cost- the rule when the damage is impermanent;
- Awarding costs of remediation would not be "reasonable under the circumstances"
- Court had no problem dispensing with defendant's cross appeal. Most important was the courts refusal to find that stigma damages (which were awarded) were not available when the damage is temporary. Instead, the court characterized the damages as arising from nuisance, trespass, and violation of the Oil Spill Act.

<> v. State,
Court of Appeals of State.
December 29, 2016
<>

- Plaintiff appeals the trial court's dismissal of her complaint against the <State Agency> in which Plaintiff alleged that the State Agency had unlawfully terminated her employment, in violation of the State's False Claims Act, in retaliation for her reporting alleged misuse of **State funds** by certain State Agency officers.
- The State moved for the trial court to dismiss Plaintiff complaint on two grounds.
  - First, the State asserted that the State had not waived its right to sovereign immunity from suit for claims of retaliation under the False Claims Act and, as such, Esserman's complaint did not invoke the subject matter of the trial court.
  - Second, the State asserted that the facts alleged in Plaintiff's complaint failed to state a claim upon which relief can be granted.
- The trial court agreed with both of the State's arguments and dismissed the Plaintiff's complaint.
- Under <State Agency> common law, with very limited exception, governmental entities are subject to liability under traditional tort theories.

<> v. <>

- The three limited circumstances in which common law sovereign immunity still exists:
  - crime prevention,
  - appointments to public office, and
  - judicial decision-making.
- On appeal, the court found that since the Plaintiff's complaint against the State does not invoke any of "the three limited circumstances in which common law sovereign immunity still exists," .
- the State was, therefore, not entitled to common law sovereign immunity.
- With regards to the trial court's finding that the Plaintiff failed to state a claim upon which relief can be granted the appeals court looked to <State Agency> Code Section 5—11—5.5—8(a), which provides:
  - An employee who has been discharged, demoted, suspended, threatened, harassed, or otherwise discriminated against in the terms and conditions of employment by the employee's employer because the employee:
    (1) objected to an act or omission described in section 2 of this chapter; or
    (2) initiated, testified, assisted, or participated in an investigation, an action, or a hearing under this chapter;
    is entitled to all relief necessary to make the employee whole.

<> v. <>

- In her complaint, the Plaintiff alleged that the State terminated her employment in retaliation for her having made "numerous objections" about certain the State officials misusing **state funds.**
- Still, the State asserts that the Plaintiff has failed to state a claim for two reasons.
- First, the State argues that she has not stated a claim because other parts of the False Claims Act limit the ability of citizens to bring *qui tam* actions 3 on behalf of the State for the recovery of funds.
- But the Plaintiff has not stated a *qui tam* action under Section 4.
- Accordingly, the State's argument on this point must fail.
- Second, the State asserts that the word "employer" in Section 8, while not defined in the <State Agency> Code, must be interpreted to mean only private employers because some other statutes scattered throughout the <State Agency> Code suggest the Plaintiff might have other remedies against a public employer for retaliatory discharge.
- There is nothing ambiguous about the word "employer" in <State Agency> Code Section 5-11-5.5-8 in the first instance and , as such, we have no authority to look elsewhere for interpretive guidance on the meaning of that statute.
- The trial court erred when it dismissed the Plaintiff's complaint for failure to state a claim upon which relief can be granted.

Jane Berryman et al V Oklahoma Corporation Commission
Court of Appeals of Oklahoma Division No. 2
Case No. 114322; Decided 11/07/2016
Mandate Issued 12/14/2016

Case arises out of a claim made by neighboring property owners for reimbursement from the Petroleum Storage Tank Indemnity Fund (Fund) for damages sustained as a result of a release from the site of a gasoline station. The Fund denied the property owners application who appealed to the Administrative Law Judge (ALJ). The ALJ upheld the denial and property owners appealed.

Facts:

- Service station sustained a release that was alleged to be the reason for an explosion that took plaintiffs home;
- The home "exploded and burned" due to gasoline collecting in a water well where free product was floating;
- The ALJ found that the cap on the amount recoverable from the Fund had already been reached. Plaintiffs maintained there were two occurrences, not one, freeing more money for the claims.

Jane Berryman et al V Oklahoma Corporation Commission
Court of Appeals of Oklahoma Division No. 2
Case No. 114322; Decided 11/07/2016
Mandate Issued 12/14/2016

Question:

- Whether the Fund authorizes reimbursement for actual physical damages and medical injuries caused by an eligible release, or whether reimbursement for such damages and injuries is limited to those that occur as a result of remediation efforts.

Ruling:

- ALJ is overturned. The fund statute language does not limit reimbursement to only those damage arising out of remediation efforts;
- Legislative intent that the Fund pay claims in a manner similar to and consistent with the payment of claims by insurance companies;
- Fund is not limited by the statute and it is not the courts prerogative to rewrite laws to fit its own concerns;
- Agency would be given deference on the question of the number of releases;
- The cap on coverage had been reached.

Oil Equipment Company, Inc. V Modern Welding Company, Inc. et al
United States District Court for the Northern District of Alabama
Southern Division
Case No. 2:14-CV-00014-MHH; Signed February 23, 2016

This case involves a claim for damages the result of the manufacture and installation of a UST. The tank at issue was purchased and installed by defendants. The tank failed less than a year later.

Facts:

- Oil Equipment Company, Inc. (OEC) constructs and maintains gas stations and convenience stores;
- OEC was constructing a gas station for Interstate Oil Company;
- OEC purchased a Glasteel II UST from Modern Welding and installed the tank on June 9, 2010;
- An employee of OEC partially completed a checklist provided by Modern Welding;
- The employee failed to check the box with the question "Has special care been used to insure backfill compaction along the tanks bottom quadrant?"
- The warranty on the tanks is conditioned on installation "in accordance with the installation instructions" and "the return of the completed installation checklist within 30 days of installation."
- Modern Welding did not receive the checklist until Sept. 23, 2010, more than two months beyond the warranty deadline.

Oil Equipment Company, Inc. V Modern Welding Company, Inc. et al
United States District Court for the Northern District of Alabama
Southern Division
Case No. 2:14-CV-00014-MHH; Signed February 23, 2016

Facts:

- The Glasteel II is a double walled tank with an interstitial monitoring—composed of steel and a second containment tank made of fiberglass. The interstitial space is monitored for liquids;
- The tank had divided steel compartments—one with 8000 gallons and one with 4000 gallons separated by a wall. It held a vacuum when delivered;
- Less than a year later, the vacuum seal failed. Modern Welding sent a representative to check the tank. The tank held a vacuum;
- One year later, the OEC alerted Modern welding that the tanks was leaking diesel fuel into the interstitial space;
- Modern Welding hired Superior Services to and C&S Petroleum to remove the tank and inspect it;
- They found no breach in the primary tank but did detect a breach in the outer tank. They removed a liquid from the space, but it did not appear to be diesel. C&S Petroleum found a “flat spot” on the bottom of the tank. Photos were taken;
- OEC demanded that Modern Welding honor its warranty and supply a new tank or refunding the purchase price.

Oil Equipment Company, Inc. V Modern Welding Company, Inc. et al
United States District Court for the Northern District of Alabama
Southern Division
Case No. 2:14-CV-00014-MHH; Signed February 23, 2016

Facts:

- Modern Welding countered the demand by reminding OEC that its warranty did not cover improper installation and pointed out the delivery held a vacuum and the flat spot on the tank when it was removed. It also pointed out the improperly filled out checklist;
- Modern welding specifically asked to be present when the tank was removed;
- On October 16, 2012, OEC removed the tank without informing Modern Welding;
- OEC had its expert observe the removal of the tank and conducted a grain size analysis of the backfill. The expert found the liquid to be groundwater;
- OEC installed a new tank and in the process destroyed any evidence that might have been present in the tank hold;
- OEC stored the old tank in an open field owned by an employee. Due to its manner of storage, the tank deteriorated. After a year of storage and degrading of the tank, OEC filed its action;
- Modern Welding sent its expert to look at the tank on May 30, 2014. Due to the way it was stored, the expert was not able to determine what might have caused the problem;
- While the litigation was ongoing, OEC, without the knowledge of Modern Welding or the court, had the bottom of the tank cut out and tested to determine if the welds were defective.

Oil Equipment Company, Inc. V Modern Welding Company, Inc. et al
United States District Court for the Northern District of Alabama
Southern Division
Case No. 2:14-CV-00014-MHH; Signed February 23, 2016

Issue:

- Did OEC's conduct constitute spoliation?
- Can OEC prove that the tank was defective without producing the tank?
- Both sides produced evidence that the tank had a crack in its fiberglass shell?

Do the facts recited above give rise to the claim of spoliation of evidence so as to provide Modern Welder the presumption that the evidence would have revealed facts in their favor and under the facts above, can OEC produce evidence to meet its burden to show breach of contract?

Oil Equipment Company, Inc. V Modern Welding Company, Inc. et al United States District Court for the Northern District of Alabama Southern Division Case No. 2:14-CV-00014-MHH; Signed February 23, 2016

Findings:

- The improper storage of the tank did constitute spoilage;
- Spoilage gives rise to three possible remedies; dismissal of the case; exclusion of expert evidence; and or a jury instruction on spoliation of evidence which gives rise to presumption against the spoiler;
- The sanction of dismissal is reserved for when there is a showing of bad faith and where lesser sanctions will not suffice;
- The spoliation by OEC was determined to be intentional and to have prevented Modern Welding from preparing a defense.

The court had no problem with dismissing OEC's claim with prejudice. The matter was appealed and in a decision of the United States Court of Appeals for the 11th Circuit, the case was affirmed in Oil Equipment Company, Inc., V Modern Welding, et al; 661 Fed.Appx.646; No. 16-11326; 09/29/2016.

Ananosian Oil Company, Inc. V State of New Hampshire
Supreme Court of New Hampshire
No. 2014-0553
Argued June 18, 2015; Opinion Issued October 27, 2015

The case involved a constitutional challenge to New Hampshire's excess insurance fund fees. The oil importers and distributors filed a petition of declaratory judgment. They also filed claims based upon equitable subrogation and unjust enrichment. The district court denied the petition and the oil importers and distributors appealed.

Facts:

- New Hampshire has an Oil Discharge and Disposal Cleanup Fund (Fund) to meet EPA's requirement for FA;
- The fund operates as an excess insurer that applies when the private insurance is used up;
- The fund is finance by a fee on imported oil;
- In 2010, the fund sued several gas suppliers, refiners, and chemical manufactures seeking damages for groundwater contamination the result of the leaking of MTBE;
- The state recovered some of the funds by settlements and some after trial;
- In 2012, the petitioners filed suit asking that the Fund be declared unconstitutional in as far as the recovered funds;
- The petitioners maintained that the Fund is maintained with fees paid by them, and the recovery should be returned to them.

Ananosian Oil Company, Inc. V State of New Hampshire
Supreme Court of New Hampshire
No. 2014-0553
Argued June 18, 2015; Opinion Issued October 27, 2015

ISSUES:

- Is the Fund protected by the legal doctrine of sovereign immunity?
- Does the Funds allocation of the recovered monies constitute an unconstitutional "taking"?
- Does the use of the recovered monies convert what is a fee to a tax under the law?

RULING:

The court had no trouble upholding the legislative scheme and affirming the district court. It did so by applying the following principals:

- Legislation is presumed to be valid and the party contesting its validity bears the burden of showing a clear and substantial conflict with the constitution;
- State is authorized to levy charges on those who necessitate services or those who avail themselves of the advantages offered. These type of charges are not taxes;
- What is a reasonable fee is within the legislative discretion;
- It is reasonable if the fee is not disproportional to the regulatory expenses;
- Having an excess does not render the fee unreasonable or invalid;
- The participants in the program have received the services provided by the fee. Assertions that the recovered fees rendered the fund "disproportionate" were rejected;
- The state had not consented to be sued for equitable estoppel or unjust enrichment;
- The "plain error" rule did not apply and the failure to raise a "taking" argument in court precluded it from being raised in the appeal.

City of Harrisonville V McCall Service Stations d/b/a Big Tank Oil et al
Supreme Court of Missouri
No. SC 94115; August 23, 2016

This matter arises out of a release from a UST that impacted a cities sewerage system contracted work. The City of Harrisonville filed suit against the owners of a service station for negligence and trespass alleged to be the result of soil contamination encountered while carrying out sewerage system improvements. The city also filed a claim for compensatory and punitive damages against the Missouri Petroleum Storage Tank Insurance Fund for negligent and fraudulent misrepresentation after the Fund refused to pay costs associated with the City having to hire a contractor qualified to handle the contamination. The Jury returned a verdict for the city on all claims and the parties appealed.

Facts:

- Defendant McCall owned a gas station in 1997 when he discovered a release. He made a claim on the MPSTF. Investigations found a significant amount of gasoline had been released;
- A consultant was hired to determine the extent of the contamination. He found that the contamination had migrated offsite towards a creek;
- In 2006, the City decided to upgrade its sewerage system;
- The Contractor encountered the contamination;
- The City consulted with the MPSTF consultant on whether the contamination it found was the same as the release found at the McCall station. The consultant agreed that it was the same;
- The City worked with the consultant for the MPSTF on the best way to proceed. It was decided that the city could use petroleum resistant piping to complete its work at an additional cost;
- The Fund believed the bid for the pipe was too high and began an independent quest for a lesser cost.

City of Harrisonville V McCall Service Stations d/b/a Big Tank Oil et al
Supreme Court of Missouri
No. SC 94115; August 23, 2016

Facts:

- The company located by the Fund submitted a bid $15,000 less than the City's bid;
- The Fund established a reimbursement cost of $135,571.00;
- A meeting was held on April 15, 2004, to discuss the path forward. Questions were raised over the bid amounts;
- There were misunderstandings taken from the meeting. The City believed the Fund had agreed to reimburse the City. The Fund believed the City should look to its previous contractors for some of the money;
- The City hired Midwest Remediation, the company it believed the Fund had approved of;
- The Fund did not reimburse the City;
- Jury found for the City on all counts and as against the Fund awarded eight million dollars in punitive damages;
- The trial judge reduced the punitive damages to $2.5 million;
- There were also awards made against the owners of the tanks.

City of Harrisonville V McCall Service Stations d/b/a Big Tank Oil et al
Supreme Court of Missouri
No. SC 94115; August 23, 2016

FINDINGS:

- The awards against the tank owners were upheld. The precise numbers testified too by the City were used to calculate the award based upon the amounts the City expended that it would not have had to expend;
- The City adequately proved detrimental reliance. There was substantial evidence in the record to support the City's assertions. The City could have backed out of the remediation and turned it over to the Fund to remove the contaminated soil at considerably greater costs to the Fund;
- The Court finds that the award of the punitive damages was in error. The statute authorizing the fund did not allow for the payment of punitive damages;
- The Fund statute authorizes payment to third parties only for "personal injury" or "property damage." Fraudulent misrepresentation by Fund personnel is not either of those claims;
- The proper party, if it were available, is not the Fund, but the Board that oversees the Fund. That Board is a State Agency. Because it was not raised earlier, that question would be remanded;
- The lower court ruling awarding punitive damages was reversed. The award of compensatory damages was maintained as the Fund did not raise that as error in the lower court and it was considered waived;

There are concurring and dissenting opinions. The dissent is a good primer for legal malpractice prevention. It is intensely procedural and describes in detail the differences in types of motions and their consequences.

R.T. Rogers Company, Inc. V Zurich Insurance Company United States District Court, S.D. West Virginia, Berkley Division 262 F.Supp.3rd 381; 07/07/2017

Case arises out of a claim made by the owner of UST's against his insurer. The station owner filed suit against his insurer alleging coverage for third party liability and cleanup for contamination found when it was in the process of removing tanks. The owner alleges bad faith by the insurance company.

FACTS:

- Plaintiff filed the complaint on December 14, 2015 in state court;
- Defendant moved to have the matter transferred to federal court on Feb. 9, 2016 under diversity jurisdiction;
- Insurance Company moved for Summary Judgment on Feb. 28, 2017;
- Plaintiff failed to respond within the fourteen day time period for responses;
- Defendant filed on April 4, 2017 to have its motion granted for plaintiff's lack of response;
- Plaintiff filed a response on April 4, 2017 to ask to be allowed to file for an out of time response;
- On April 7, 2017, the plaintiff filed its opposition;
- On April 13, 2017, defendant filed a motion to strike the pleading as untimely;
- Policy was a "claims made" policy requiring a report of a release during the policy term;
- Policy period was April 1, 2003 until April 1, 2004 with a retroactive date of Feb. 19, 1994.

R.T. Rogers Company, Inc. V Zurich Insurance Company
United States District Court, S.D. West Virginia, Berkley Division
262 F.Supp.3rd 381; 07/07/2017

FACTS:

- Policy had a notice provision requiring the insured to provide notice to the insurance company in advance of removal or replacement of a covered tank;
- Policy had an exclusion for any release the owner knew of before the effective date of the policy;
- The station was in existence since the 1920's and had several different UST's. The WVDEP had investigated a release in 1996;
- Owner hired a company to remove the tanks on June 18, 2003. Samples found contamination;
- Six days later, the owner informed the insurance company;
- Owner disposed of the tanks and made demand on its insurer;
- Insurer conducts its own investigation and agrees to only cover 42% of the costs based upon its assessment that much of the contamination was historic and that the insureds failure to inform it according to the policy prejudiced its rights;
- Correspondence between the parties continues for a few years with the owner demanding coverage and the insurance company repeating its decision on the 42% coverage;
- Twelve years after demanding coverage, the owner filed the complaint. There is a six year gap in correspondence before the suit was filed.

R.T. Rogers Company, Inc. V Zurich Insurance Company
United States District Court, S.D. West Virginia, Berkley Division
262 F.Supp.3rd 381; 07/07/2017

FINDING:

- The insurance company's motion is granted, all motions and pleadings filed in response are denied and ruled moot.

REASONING:

- The late filing cannot be attributed to excusable neglect. Plaintiff pleaded a power outage and the overlooking of the local rule. The defendant's motion to strike the motion is granted;
- The filing over 12 years after the claim is untimely under contract prescription rules of both New York and West Virginia. Summary judgment is appropriate.

Christopher E. Rose V Interstate Oil Company, Inc.
Court of Civil Appeals of Alabama
208 So3d 26; No. 2141045; April 29, 2016

This matter arises out of a third party claim filed on behalf of the plaintiffs to enforce an agreement arrived at in mediation proceedings. The Alabama Underground Storage Tank Trust Fund (Trust) file suit to enforce the agreement. The third party claimant opposed the suit claiming the holder of the mortgage had refused to sign the agreement. The lower court ordered the parties to honor the agreement and the owner/third party appealed.

FACTS:

- Mr. Rose owns property adjacent to a Purple Cow store, the owner of UST's;
- Interstate Oil (defendant) furnishes and stores fuel in the UST's;
- In December 2011, the Alabama DEM informed Mr. Rose that a release from the UST's had migrated under his property;
- On March 19, 2013, Mr. Rose filed suit against the owner and the Trust;
- The parties agreed to mediate the claims and on January 30, 2015 entered into a mediation agreement.

Christopher E. Rose V Interstate Oil Company, Inc.
Court of Civil Appeals of Alabama
208 So3d 26; No. 2141045; April 29, 2016

FACTS:

- The mediation agreement required the Fund and Interstate Oil to pay to Mr. Rose $100,000.00;
- The agreement contained language that the "holder of the mortgage" had to sign the release (those sneaky lawyers—making sure they can't be sued later should Mr. Rose default);
- On August 13, 2015, the Trust filed a motion to enforce the mediation agreement or judgement on the pleadings. They maintained Mr. Rose had failed to present the settlement for approval to the mortgage holder;
- Mr. Rose maintains that he has presented the release and the mortgage company refuses to sign. He counters that the agreement did not have a meeting of the minds and the agreement is void, returning them to the courtroom. He also maintains the motion for judgment on the pleadings is really a motion for summary judgment which should be denied.

Christopher E. Rose V Interstate Oil Company, Inc.
Court of Civil Appeals of Alabama
208 So3d 26; No. 2141045; April 29, 2016

FACTS:

- The lower court, after a hearing, found the agreement valid and ordered the parties to complete the obligations;
- Mr. Rose appealed.

FINDING:

- Reversed and Remanded.

REASONING:

- Both parties attached documents to their motions. This evidence converts a motion for judgement on the pleadings to a motion for summary judgement;
- A review under summary judgment reasoning is different than one on judgment on the pleadings;
- Questions of fact remain and arguments of counsel are not evidence. In this case one side asserted that Mr. Rose failed to present the agreement to the mortgage company and Mr. Rose said they had refused. There was no evidence of either statement being true.

Hartley Company V J.F. Acquisition, LLC
United States District Court for the Southern District of Ohio, Western Division
Case No. 3:15-CV-94; Signed 05/01/2017

Case involves the question of whether the Ohio Petroleum Underground Storage Tank Release Compensation Board (Board) is a necessary party to litigation in federal court wherein it is alleged that a party is responsible for damages the result of a release from a UST

Facts

- Hartley is the owner of the UST's that sustained the release and pays in to the Board fund;
- J. F. Acquisitions LLC (J.F.), is the installer of the Swift Check Valve, alleged to be the cause of the release;
- Upon filing suit, the court made a ruling that the Board was a necessary party;
- The Board is a state agency;
- The Board filed a response requesting the ruling be withdrawn and implement a process for determining the joinder issue;
- Court withdrew its order and placed a briefing schedule limited to five issues;
    1. Whether the 11th Amendment to the US Constitution prohibits the Board from being joined;
    2. Whether the Boards joinder deprives the court of subject matter jurisdiction;
    3. Whether the Board is a necessary party under Rule 19(a);
    4. If the Board is a necessary party, whether joinder is feasible; and,
    5. If joinder is not feasible, whether the Board is an indispensable party under Rule 19(b), without which the case may not proceed.

Hartley Company V J.F. Acquisition, LLC
United States District Court for the Southern District of Ohio, Western Division
Case No. 3:15-CV-94; Signed 05/01/2017

Ruling:

- The Board is a state agency (using the usual four factors of Lowe V Hamilton,;
- The Board is a necessary party (another four part test);
- Joinder of the Board is prevented by the 11th Amendment to the US Constitution;
- The Board is an indispensable party under Rule 19(b) and equity and justice requires that the court refrain from exercising jurisdiction; and,
- The court will remand the matter to the Miami County, Ohio Court of Common Pleas.

Hartley Company V J.F. Acquisition, LLC
United States District Court for the Southern District of Ohio, Western Division
Case No. 3:15-CV-94; Signed 05/01/2017

Positions:

- J.F. maintains the Board is not a state agency;
- Hartley maintains they are not a necessary party as any money they recover from J.F. is required to be returned to the Board;
- Subrogation does not take place until a judgment is rendered;
- J.F. maintains the statute governing the Board allows it to file its own request for reimbursement by way of legal subrogation, subjecting it to possible conflicting judgments;
- A judgment against J.F. in the matter filed by Hartley would not preclude the Board from obtaining another judgment against J.F.;
- The amount of the subrogation is not determinable as the remediation is ongoing.

The Court issued a finding consistent with the above and gave the parties 30 days for the parties to file motions for reconsideration.

Andrew Lester V Department of Environmental Quality
Commonwealth Court of Pennsylvania
153 A.3d 445; No. 1778 C.D. 2015; January 13, 2017

This matter arises out of determination of the Environmental Hearing Board (Board) in No. 2014-025-B. The Board made a determination that a son of an owner was an operator under the Storage Tank Act and thus liable for permanent closure of UST's on a retail fueling station.

FACTS:

- Plaintiff received an administrative order from the Department of Environmental Protection (DEP) requiring him to permanently close UST's;
- Plaintiff filed an appeal to the Environmental Hearing Board;
- The Board found that owners and operators were subject to the Storage Tank Act;
- Plaintiff had taken actions which showed he was an operator by evidencing actions consistent with exercising control and responsibility for the UST's;
- Station was known as Ken's Keystone and had four tanks;
- The owner is listed as Kenneth Lester in the DEP records. Andrew is Kenneth's son;
- An inspection found deficiencies at the site.

Andrew Lester V Department of Environmental Quality
Commonwealth Court of Pennsylvania
153 A.3d 445; No. 1778 C.D. 2015; January 13, 2017

FACTS:

- The son attended meetings at DEP;
- The son signed the forms placing the tanks in temporary closure;
- Those forms had a box, which the son checked, naming him as “facility operator”
- The tanks have been in temporary out of service since June 23, 2010. The regulations require they be closed if not brought back in service by June 23, 2013;
- Revocation of permit by rule was issued by DEP in May 2011 to both the father and the son ordering them to cease operating the tanks;
- Inspection on August 2013 revealed the tanks had not been closed as well as other violations;
- A closure order was issued by DEP on February 2014. The order was issued to both father and son. It ordered the usual requirement to pay fees and close the tanks.

Andrew Lester V Department of Environmental Quality
Commonwealth Court of Pennsylvania
153 A.3d 445; No. 1778 C.D. 2015; January 13, 2017

FACTS:

- On March 2014, Andrew Lester appealed the order, Kenneth Lester did not;
- An administrative hearing was held by the EHB. Testifying were DEP inspectors;
- Andrew maintained the inspectors were the ones who convinced him to sign as operator and that he didn't think he was one.

FINDING:

- The court upheld the finding of the EHB that Andrew was an operator and could be held responsible.

REASONING:

- An "Operator" for purposes of the Storage Tank Act is "Any person who manages, supervises, alters, controls, or has responsibility for the operation of a storage tank."
- The forms from 2009, 2010, and 2013 all listed him as manager.

Andrew Lester V Department of Environmental Quality
Commonwealth Court of Pennsylvania
153 A.3d 445; No. 1778 C.D. 2015; January 13, 2017

REASONING:

- He was present at the inspections and checked the box as operator, not employee or owner;
- As late as 2013 in another inspection he again checked of operator;
- Most communication between DEP and the station was through Lester, who attended the meetings;
- The inspectors were never told that he was acting on behalf of his father—but instead always as operator of the station;
- Judging the demeanor of live witnesses is the exclusive jurisdiction of the EAB, the finder of fact;
- EAB found the testimony of the DEP inspectors credible. That was entitled to deference;
- The tanks were still being "operated" even though they had been emptied. The regulations define the operation time of a tank as "the period beginning when installation of the tank system has commenced until the system is properly closed."

Andrew Lester V Department of Environmental Quality
Commonwealth Court of Pennsylvania
153 A.3d 445; No. 1778 C.D. 2015; January 13, 2017

REASONING:

- Holding him responsible is not a "taking" as he does not own the tanks. The exercise of police power through the Storage Tank Act is to be upheld as not unduly oppressive and consistent with the goals of the Act;
- The interest of the general public rather than a particular class of persons, must require governmental action;
- The means must be necessary to effectuate the purpose;
- The means must not be unduly oppressive upon the property holder, considering the economic impact of the regulation, and the extent to which the government physically intrudes upon the property;
- Closure of tanks meets all these tests.

There is a concurring opinion.